

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EL11HB-66540**

[REDACTED],)	
)	
Complainant,)	
)	
v.)	Administrative Action
)	FINDING OF PROBABLE CAUSE
San Mar,)	
)	
Respondent.)	

On May 23, 2017, [REDACTED] (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that San Mar (Respondent) discriminated against him based on disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

Summary of the Investigation

Respondent supplies imprinted apparel and accessories to retail and private brands. In February 2013, Respondent employed Complainant as a laborer at its distribution facility in Robbinsville, New Jersey. Respondent terminated Complainant's employment on April 12, 2017, purportedly for falsifying time sheets and stealing time.

Complainant alleged that Respondent began issuing him write-ups and subsequently discharged him after he told them that he was going out on leave for surgery related to his disability.

In its Position Statement, Respondent denied that it discharged Complainant based on disability. Instead, it claimed that it terminated Complainant's employment because he was caught stealing time on two separate occasions in a one-week period. It explained that on April 3, 2017, Complainant filled out a Paid Time Off sheet incorrectly, writing that he returned to work at 6:45 a.m. when Respondent's security cameras showed him returning to work at 6:51 a.m., which amounted to Complainant attempting to steal 6 minutes of time from Respondent. It stated that on April 6, 2017, Complainant parked illegally near the building and punched in at 6:00 a.m., left the building to park correctly, and returned at 6:11 a.m., which amounted to Complainant attempting to steal 11 minutes of time from Respondent. In addition, Respondent argued that because it granted Complainant numerous accommodations for his different disabilities, including significant leave time, it was absurd for Complainant to contend that it discharged him because he requested additional accommodations for his upcoming surgery.

The investigation showed that during his employment at Respondent, Complainant's direct supervisor was Christopher Tonra, Respondent's Distribution Center Supervisor. Tonra's supervisor was Angie Lillis, the Assistant General Manager of the warehouse in which Complainant worked.

In an interview with DCR, Complainant pointed out that over the five years he worked at Respondent, he took one extended leave for his disability and Respondent granted him numerous accommodations including allowing him to perform light duty work for extended periods on different occasions.

Respondent provided documentation showing that it granted Complainant accommodations and extended leaves in connection with two workplace injuries between November 2014 and February 2017. Respondent's documents showed that Complainant sustained an injury on the job in November 2014 and received light duty from November 20, 2014 through January 12, 2015. Complainant was injured on the job again on October 1, 2015. Respondent granted him the accommodation of light duty work until March 17, 2016. In the interim, the injury worsened and required that Complainant undergo surgery on March 17, 2016. Complainant took Family Medical Leave Act (FMLA) leave from March 17, 2016 to June 8, 2017. When Complainant's doctors did not give him medical clearance to return to work on June 8, 2016, Respondent granted him additional leave through August 11, 2016. When Complainant returned to work on August 16, 2016, Respondent granted him a modified work assignment as a reasonable accommodation for his disability, which remained in effect until February 6, 2017.

Complainant told DCR that on February 15, 2017, he sustained another injury while on the job. He explained that when he told his team leader [REDACTED] about the injury, [REDACTED] instructed him to see Respondent's doctors. Complainant stated that he visited Respondent's doctors that day, they diagnosed him with a sprained ankle, and told him to report back to work on light duty. Complainant acknowledged that Respondent gave him light duty, which included breaking down recycling boxes at a table with a chair that was provided to him.

According to Complainant, his ankle injury worsened, and he visited other doctors, who recommended that Complainant undergo surgery. Complainant stated that sometime in late March 2017, he told Respondent's human resources department (HR) that his injury required surgery and that he would need to take additional leave after the surgery to recuperate. Complainant stated that immediately after speaking with his doctor, he told Tonra that his doctor wanted him to have surgery and provided Tonra with follow up sheets from his doctor stating as much. Complainant said that at that time Tonra told him to go out and get the surgery whenever he needed to do so.

Complainant told DCR that after he reported to HR and Tonra that he would need to take another leave after his surgery, they isolated him from the rest of his team and changed his light duty to menial tasks including cleaning under large clothing trays and sorting clothes into large bins. Complainant stated that these tasks were not within his job duties.

As to the two incidents that Respondent claimed resulted in his discharge, Complainant stated that on April 3, 2017, he arrived at work and punched in at 6:00 a.m. He stated that upon realizing that he had forgotten to put the air cast on his leg, he asked Tonra for permission to return home and retrieve the cast. Complainant acknowledged that when he left he did not punch out and said that he forgot to do so.

Complainant stated that when he returned to work the next day, Tonra asked him to fill out a Paid Time Off (PTO) sheet because Complainant had forgotten to punch out when he went home to obtain his air cast. The investigation showed that Respondent used the information on the PTO sheet to fill out employee's payroll adjustment sheets when calculating pay for the relevant pay period. Complainant recalled Tonra telling him to put in 6:45 a.m. as the time that he returned to work, which is the time that Complainant wrote on his PTO sheet. He stated that he did not know that he actually returned to work at 6:51 a.m. and noted that Tonra did not speak with him about writing the incorrect time on the PTO sheet at that time.

Complainant explained that when any employee on his team had to fill out a PTO sheet or payroll adjustment, Tonra always told the employee what time they had left work and what time they had returned to work. He also noted that Respondent's employees accrue time in increments of minutes. He stated that he had accrued significant PTO, and that he never would have risked being disciplined for 6 minutes of time.

Complainant told DCR that he believed Tonra purposefully gave him the wrong sign-in time so that Tonra could issue a discipline to him for stealing company time. He further opined that Tonra and Lillis were trying to find reasons to discharge him because he had requested disability leave for his upcoming surgery.

DCR interviewed three employees whom Tonra supervised. Each of the employees confirmed that Tonra or another supervisor would fill in the time section or tell them what to put in the time section of the PTO sheet, especially in situations like Complainant's where management needed to check the camera to see what time the employee came into work after forgetting to punch in or returned to or departed from work after forgetting to punch out.

Complainant confirmed Respondent's statement that on April 6, 2017, he parked his car in an unassigned space just outside the employee entrance, ran into the building, punched in at 6:00 a.m., returned to his car, parked in his normal spot, and arrived to his work station by 6:10 a.m. Complainant explained that Tonra saw him commit this infraction and issued him a verbal warning for stealing time from the company.

In an interview, Tonra recalled that sometime in March 2017, Complainant told him that he would be going out on leave to get surgery on his injured ankle.

Tonra told DCR that on April 3, 2017, he was waiting in the cafeteria area of the facility to greet new temporary employees when he saw Complainant run towards the time clock. He stated that he again saw Complainant in the parking lot a few minutes later, where Complainant told him that he needed to return home because he had forgotten to put on his air cast. Tonra said that he allowed Complainant to return home but stated that he did not know Complainant had already punched in for the day. Tonra recalled confronting Complainant upon his return to work and asking him whether he had punched in before leaving to retrieve his air cast. According to Tonra, Complainant said that he had not punched out, and Tonra told him that leaving after he clocked in was unacceptable. He recalled telling Complainant to fill out a PTO sheet so that Respondent could process the time during which Complainant was punched in but away from work.

Tonra denied having told Complainant to fill in the time as 6:45 a.m. on the PTO sheet. He claimed that it was against Respondent's procedures for him to tell employees the time to put down on PTO sheets. Tonra told DCR that he never told any employees the time to list on a PTO sheet and never wrote the time in for an employee on a PTO sheet. When DCR pointed out to Tonra that several employees had told DCR that he either filled in their time or told them the correct time to enter, Tonra again denied ever having done either.¹ In addition, as part of the investigation, Respondent produced PTO sheets of several employees on Complainant's team. On three of the select PTO sheets that Respondent produced to DCR, dated April 14, 2017, April 24, 2017, December 12, 2017, Tonra wrote in the time that employee [REDACTED] left early, thus contradicting Tonra's statements to DCR.

With regard to the April 6, 2017 incident, Tonra stated that he was again waiting in the cafeteria to greet new temporary employees when he saw a car parked across two visitor's spaces in front of the building. Tonra stated that he saw Complainant rush through the cafeteria away from the time clock, get into the illegally parked car, move his car and return to work about 10 minutes later. Tonra told DCR that he confronted Complainant about punching in and moving his car while on the clock. According to Tonra, when he told Complainant that this action was dishonest, Complainant agreed, said that he did it so that he was not technically late, and told Tonra that he would try to be on time in the future.

Tonra stated that based on Complainant's having stolen time twice in the same week, after being warned about it, he decided to discharge Complainant. He stated that Jessica Rivera, Respondent's Human Resources manager, participated in the decision to discharge Complainant.

DCR interviewed Lillis regarding Complainant's termination. Lillis claimed that she was informed by Tonra of Complainant's violations of Respondent's Conduct Guidelines. Lillis alleged that she helped make the decision to terminate Complainant with Tonra and Rivera. She stated that she met with Complainant, Tonra and Rivera on April 12, 2017, and told Complainant that because he stole time from the company, Respondent was discharging him.

Respondent claimed that it discharged another employee, [REDACTED], on January 5, 2018, for stealing time in a manner similar to Complainant. Respondent provided [REDACTED] termination letter, which stated that he admitted to leaving the building to retrieve an item from his car while he was on company time and without permission. The letter also pointed out that Respondent issued [REDACTED] a warning about three weeks before this incident explaining that he needed to notify a member of Human Resources or management if he was going to leave the building. Respondent concluded the letter by stating that [REDACTED] falsification of time records led to his termination.

Respondent's counsel told DCR that Respondent does not have a progressive discipline policy. Respondent provided a copy of its discipline policy, which states that when an employee violates company policy or engages in behavior Respondent finds unacceptable, Respondent determines what action is appropriate on a case-by-case basis.

¹ At this point in the interview, Respondent's counsel requested to know the names of all witnesses who told DCR that Tonra wrote in times on their PTO sheets. Counsel did not explain why she wanted their names and the DCR investigator refused to provide that information.

Analysis

At the conclusion of an investigation, DCR Director is required to determine whether “probable cause exists to credit the allegations of the verified complaint.” N.J.A.C. 13:4-10.2(a). For purposes of that determination, “probable cause” is defined as a “reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe” that the LAD was violated. N.J.A.C. 13:4-10.2(b).

A finding of probable cause is not an adjudication on the merits. It is merely an initial “culling-out process” in which DCR makes a threshold determination of “whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits.” Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev’d on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the “quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits.” Ibid.

The LAD makes it illegal to refuse to hire or discharge or to discriminate against an employee in “compensation or in terms, conditions or privileges of employment” based on disability. N.J.S.A. 10:5-12(a). An employer must also provide a reasonable accommodation to the limitations of an employee who is a person with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. See N.J.A.C. 13:13-2.5; Tynan v. Vicinage 13 of Superior Court, 351 N.J. Super. 385, 400-01 (App. Div. 2002).

Here, the investigation found sufficient evidence to support a reasonable suspicion that Respondent discriminated against Complainant based on disability. The parties do not appear to dispute that Complainant suffered from a disability. The parties agreed that in March 2017, Complainant notified Tonra of his impending need to take leave related to surgery on his injured ankle. Tonra confirmed that he was one of decision makers involved in discharging Complainant. Respondent contends that Complainant’s disability or need for leave did not factor into its decision to terminate his employment. Tonra told DCR that Respondent discharged Complainant for stealing time from the company twice in the same week.

The investigation found sufficient evidence that Respondent’s articulated reason for Complainant’s termination may be a pretext for discrimination. See Zive v. Stanley Roberts, Inc., 182 N.J. 436, 448-449 (2005). Complainant reported to DCR that Tonra told him the incorrect punch-in time to enter on his PTO form in what he believed was an attempt to set up a scenario in which Tonra could discharge Complainant before he took leave to undergo surgery to correct an ankle injury that he sustained on the job. Tonra denied that he ever filled out any PTO forms for employees, or told employees what time to enter on either PTO or payroll adjustment sheets. However, three current employees of Respondent corroborated Complainant’s statement concerning Tonra’s practices and told DCR that Tonra instructed them to enter a specific time on PTO and payroll adjustment sheets and even filled in the sheets himself sometimes. DCR reviewed PTO sheets that Respondent provided, three of which showed that Tonra filled out some of the sheets himself. Additionally, another employee terminated for stealing time was provided with a warning before his termination. It does not appear that Complainant was issued a similar warning prior to his termination. Consequently, these discrepancies support Complainant’s claim that Respondent may have articulated pretextual reasons to explain Complainant’s termination such that a full plenary hearing is required to resolve this matter. N.J.A.C. 13:4-10.2(b).

At this threshold stage in the process, there is sufficient basis to warrant “proceed[ing] to the next step on the road to an adjudication on the merits.” Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant’s allegations of disability discrimination.



Date: November 20, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights